GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-002

DARRYL HAIRSTON,
Claimant–Petitioner,

v.

FIRST TRANSIT and
SEDGWICK CLAIMS MANAGEMENT SERVICES,
Employer/Third-Party Administrator-Respondent.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2016 JUN 17 AM 8 44

Appeal from a December 8, 2015 Compensation Order on Remand
by Administrative Law Judge Gerald D. Roberson
AHD No. 14-621A, OWC No. 718363

(Decided June 17, 2016)

David J. Kapson for Claimant
Tony D. Villeral for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL, for the Compensation Review Board:

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Darryl Hairston (Claimant) sustained a work-related injury on June 27, 2014, when a vehicle in which he was sitting was struck by a backward-rolling bus owned and operated by his employer, First Transit (Employer). The impact resulted in Claimant seeking medical attention the following day from Concentra, which treated Claimant for what was diagnosed as a lumbar strain.

Claimant was treated thereafter by numerous physicians at the medical practice group of Phillips & Green, including Drs. K. Thomas Wagner, Neil Green, Frederic Salter, and Richard Meyer.

Employer accepted the compensability of the claim for benefits under the D.C. Workers' Compensation Act, D.C. Code section 32-1501, *et seq.* (the Act).

Claimant continued to treat with several different physicians associated with the medical practice of Phillips & Green. One of those physicians, Dr. Richard Meyer, who treated Claimant on two of his nine visits to Phillips & Green (CE 3, *passim*,)[1] authored two reports concerning the degree of medical impairment that Claimant had sustained.

The first opinion expressed, contained in a report (CE 2) following an evaluation performed on March 11, 2015, was that Claimant's lumbar injury had resulted in a 12% whole person impairment, according to the Fifth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment (the AMA Guides), after considering three separate tables. CE 2 contained the following substantive assessments relating to Claimant's condition, with the portion italicized to identify those findings relative to the right leg:

> On examination there is tenderness and spasm in the cervical, paracervical and left trapezius area. There is 40 [degree] of right rotation; 30 [degree] of right lateral bending, 60 [degree] of left rotation; 40 [degree] of left lateral bending; 40 [degree] of extension; 50 [degree] of flexion of the cervical spine. Spurling test is negative. Shoulder elevation is good. Neurological testing of the upper extremities intact.
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> There is diffuse tenderness and spasm in the mid to lower paralumbar area and lumbar spine bilaterally. Forward flexion to 55 [degrees]; left lateral bending and rotation to 10 [degrees]; right lateral bending and rotation to 10 [degrees]; extension to 5 [degrees]. *Straight leg raising causes back pain on the right without radicular pain. No pain on hip rotation. No tenderness or swelling about the thighs, tibias, knees, ankles, or feet.*
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> Diagnoses: 1. Cervical strain.
> 2. Lumbosacral strain superimposed on history of degenerative disc disease.
> 3. Posttraumatic headaches.
> 4. Lumbar disc protrusions L4-5 and L5-S1.
>
> * * *
>
> Patient has sustained permanent injuries from the trauma sustained on 6-27-14 and appears to have reached maximum medical improvement. Using the [AMA Guides], table 15-8, patient has a 4% whole person permanent partial impairment, from Table 15-9, a 6% whole person permanent partial impairment, and from Table 15-14. A 2% whole person permanent partial impairment, coming to a 12%

[1] Review of the Phillips & Green reports indicate that the third visit to Dr. Meyer was not for treatment, but rather for the purpose of a permanent impairment rating. The final (and second) treatment visit with Dr. Meyer was on November 26, 2014, at which time Dr. Meyer discharged Claimant from further care, advised a cessation of any further medications for the work injury, imposed no restrictions or limitations on Claimant's work or other activities, and noted that Claimant was at that back at work at full duty. CE 3, Report of November 26, 2014.

> whole person permanent partial impairment as a result of the injuries initially sustained on 6-27-14.

CE 2 (emphasis added).

CE 2 contained no mention of any medical impairment to Claimant's right leg, nor did it contain any specific reference to loss of function, atrophy, weakness or loss of endurance, which are 4 of the 5 "subjective factors" that the Act permits an ALJ to consider in addition to whatever impairment the ALJ may determine exists under the AMA Guides.

The second opinion by Dr. Meyer was contained in a report written a year and a month later on April 1, 2015 (CE 1) in response to Claimant's counsel's inquiry. It was issued without a further examination. CE 2 reads in its entirety:

> In response to your inquiries of 3-25-15 on this gentleman, the patient has evidence of right lower extremity sensory deficit from the injuries sustained on 6-27-14. Using Table 17-37 of [the AMA Guides] this would equal a 12% lower extremity permanent partial impairment of the right lower extremity, and adding the Five Factors including loss of function, atrophy, pain, weakness and loss of endurance, I would add 12% to this total.

CE 1.

Claimant was examined at Employer's request for the purpose of an independent medical evaluation (IME) by Dr. Willie Thompson on October 29, 2014. In his examination Dr. Thompson reported detecting no limp, no evidence of any sensory deficits in the legs or any limitations in range of motion, any pain or spasm of the low back, or any limitations on muscle strength, bulk or tone. EE 1 at 4.

In an addendum authored October 29, 2014 without further examination of Claimant (EE 1), Dr. Thompson indicated that he had had the opportunity to review Claimant's treatment records pre-dating the work injury as well as a subsequent MRI. Nothing in these materials altered his previously expressed views, and he opined that Claimant exhibits no evidence of any medical impairment.

Claimant presented his claim for an award of 24% permanent partial disability under the schedule to his right leg at a formal hearing before an administrative law judge (ALJ) in the Administrative Hearings Division (AHD), which Employer opposed.

On December 8, 2015, the ALJ issued a Compensation Order (the CO) awarding Claimant 6% permanent partial disability to the right leg under the schedule.

Claimant filed an Application for Review (AFR) and memorandum in support thereof (Claimant's Brief) with the Compensation Review Board (CRB), arguing that the ALJ erroneously failed to make an adequate award, and seeking to have the award "reversed and

remanded for further findings consistent with the CRB's Decision and in accordance with the law". Claimant's Brief at 9.

Employer filed an Opposition to the AFR and memorandum in support thereof (Employer's Brief), arguing that the award made is supported by substantial evidence and should be affirmed. Employer's Brief at 6.

Because the CO's award of 6% permanent partial disability to the right leg is supported by substantial evidence and flows rationally from the ALJ's interpretation thereof, we affirm.

ANALYSIS

As an initial matter we point out that Claimant's Brief misstates the nature of a significant aspect of the law which, although has no bearing upon this case, but which misstatement has been made frequently enough in appeals to the CRB that we feel compelled once again to point out the error.

We refer specifically to the following excerpt found at page 7 of Claimant's Brief, which reads as follows:

> Whether or not the Claimant has suffered a wage loss is irrelevant to determining the Claimant's eligibility to received [sic] scheduled member benefits, because of a conclusive presumption that the Claimant will have his or her working life end earlier due to the injury. *See Corrigan v. Georgetown Univ.*, 2007 DC Wrk. Comp. LEXIS 364.

As noted above, this issue has no relevance to anything that has been presented in this appeal, since neither party presented evidence of Claimant's post-injury earnings nor argued at either the formal hearing or in the CRB briefs that anything relating to Claimant's post-injury earnings has any impact upon the outcome of the claim.

However, we have repeatedly pointed out in connection with this, or nearly identical assertions concerning the continuing vitality of the central holding in *Corrigan,* is that it has been abandoned and no longer represents the law with respect to schedule awards under the Act. *See Al-Robaie v. Fort Myer Construction*, CRB No. 10-014 (June 6, 2012); *Hill v. Howard University*, CRB No. 12-180 (March 27, 2013); *El Masaoudi v. Uno Chicago Grill*, CRB No. 15-093 (October 15, 2015); and *Brown v. WMATA*, CRB 15-115 (December 21, 2015).

While *Corrigan* contains a number a statements of legal principles that are valid, it does not now and has not since June 6, 2012 stood for the proposition for which it has at least by implication been cited and for which we have been required to expend time correcting.

We recognize that the reference to being "eligible" for a schedule award is arguably technically correct. However, Employer in this appeal, and no one to our knowledge in any other appeal has ever argued before the CRB that a claimant's lack of a demonstrated wage loss from a work injury renders them "*ineligible*" to receive an award under the schedule.

There is no "conclusive presumption that the Claimant will have his or her working life end earlier due to the injury", nor is it correct to imply that post-injury return-to-work earnings are, as a matter of law, irrelevant when assessing schedule loss awards. That is simply not the case.

While we shall shortly discuss the issues raised by Claimant in support of his request that the CO be returned for further consideration and an additional award, we note that Claimant does *not* argue that the ALJ has failed to adequately *explain* either why the treating physician, Dr. Meyer, had his opinion rejected, or that the ALJ provided an inadequate explanation as to how he arrived at the award of 6%.[2] While we are satisfied that the CO adequately addresses both these potential bones of contention, we need not expound upon them, given that they have not been raised.

The first portion of Claimant's Brief consists of either recitations of the facts or expositions of points of law relating to the attainment of permanency and the manner in which permanent partial disability compensation rates under the schedule are calculated. None of these legal issues have relevance to this appeal.

What remains, then, are arguments that at root amount to disagreements over the ALJ's interpretation and assessment of the evidence.

The first substantive arguments we discern are found at page 7, where Claimant argues "The ALJ's finding that Mr. Hairston has not demonstrated impairment to the right leg is not supported by substantial evidence. To the contrary, substantial evidence in the record supports a finding that Mr. Hairston has demonstrated a medical impairment of 12% for the right lower extremity."[3]

First, the predicate of the argument is inaccurate where it asserts that the ALJ found that Claimant had "not demonstrated impairment to the right leg" (by which we shall assume Claimant meant "disability"); the ALJ made an award of 6% permanent partial disability to the right leg. Obviously, the ALJ accepted that Claimant had demonstrated impairment"; elsewise there would have been no award.[4]

Second, the assertion that error is present because "substantial evidence supports a finding that Mr. Hairston demonstrated a medical impairment of 12% for the right lower extremity" is irrelevant. Our task is to determine whether the determination of the ALJ is supported by substantial evidence; we are not concerned with whether there is substantial evidence to support a contrary or different conclusion. *See Marriott International v. DOES,* 834 A.2d 882(D.C. 2003).

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[2] Claimant does argue that the ALJ's 6% rating is inaccurate as an arithmetic matter, an argument we address *post.*

[3] We are confused as to why the Claim for Relief made at the formal hearing was for a 24% award, while in this appeal Claimant argues for 12%.

[4] We recognize that the CO does contain the sentence "The Claimant has not established impairment for his right leg." CO at 7. However, in reading the CO as a whole, particularly given that an award was made, this statement is either a harmless error, or an imprecise statement by the ALJ that Claimant had failed to prove the disability to the extent claimed in his Claim for Relief, a point that Claimant's Brief could be construed to concede. *See* n. 3, *ante.*

The remaining error asserted by Claimant is that the 6% that was awarded is patently erroneous because there is a "discrepancy" between the ALJ's accepting a 2% impairment for loss of endurance, and a 2% for loss of function yet ultimately awarded a 6% permanent partial impairment. The ALJ made three separate 2% "Maryland factors" findings, which totals 6%".*See* Claimant's Brief, at 9.

What this argument fails to take into account is what the ALJ actually found and awarded: the CO contains a finding that Claimant has sustained a 2% permanent partial disability for ongoing pain (CO at 8, line 14), a 2% permanent partial disability for lost function (*id.*, line 33), and a 2% permanent partial disability for lost function (*id.)*. Two plus two plus two equals six, just as the ALJ concluded.

In general, our reading of the CO is as follows: the ALJ rejected an impairment rating based upon the AMA Guides as being inadequately supported, rejected two of the five "Maryland" factors included in Dr. Meyer's addendum because there was no mention of them in the first evaluation report, and accepted three of them based upon Claimant's testimony and their being referenced in the initial evaluation report.

In other words, the ALJ credited the part of Dr. Meyer's conglomerated "Five Factors" analysis for which the first evaluation report provides support, and rejected any award based upon those for which no such support exists in the first evaluation report. We discern no error.

CONCLUSION AND ORDER

The ALJ's findings of fact are supported by substantial evidence and the award is in accordance with the Act. The Compensation Order is affirmed.

So ordered.